Elizabeth J. Cabraser (State Bar No. 083151)
Jacqueline E. Mottek (State Bar No. 124448)
Stephen H. Cassidy (State Bar No. 142034)
Fabrice N. Vincent (State Bar No. 160780)
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, California 94111-3999
Telephone: (415) 956-1000

William S. Lerach (State Bar No. 68581)
Alan M. Mansfield (State Bar No. 125998)
Patrick W. Daniels (State Bar No. 190715)
MILBERG WEISS BERSHAD
HYNES & LERACH LLP
600 West Broadway, Suite 1800
San Diego, CA 92101
Telephone: (619) 231-1058
- and -
Reed R. Kathrein (State Bar No. 139304)
MILBERG WEISS BERSHAD
HYNES & LERACH LLP
222 Kearny Street, 10th Floor
San Francisco, CA 94108
Telephone: (415) 288-4545

[Additional counsel appear on signature page]

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

MARCIA SPIELHOLZ, On Behalf of Herself and All Others Similarly Situated; DEBRA PETCOVE, On Behalf of Herself and All Others Similarly Situated; and WIRELESS CONSUMERS' ALLIANCE, INC.,On behalf of the General Public,

Plaintiffs,

vs.

LOS ANGELES CELLULAR TELEPHONE COMPANY, a partnership; BELLSOUTH CELLULAR CORPORATION, a Georgia Corporation; AT&T Wireless Services, Inc., a Delaware Corporation; and DOES 1 through 100, inclusive,

Defendants.

Case No. BC186787

Assigned For All Purposes to The Hon. Wendell Mortimer, Jr.

PLAINTIFFS' OPPOSITION TO MOTION TO STRIKE

Hearing Date: February 11, 1999
Time: 11:00 a.m.
Dept.: 56

Exhibit 3

TABLE OF CONTENTS

		Page
I.	INTRODUCTION AND SUMMARY OF ARGUMENT	1
II.	ARGUMENT	3
A.	The Motion to Strike Violates Los Angeles Superior Court Rule Requiring a Party To Simultaneously File a Demurrer and Motion to Strike.	3
B.	Plaintiffs' Claims Are Not Preempted By The Federal Communications Act.	5
	1. The Federal Communications Act Does Not Wholly Preempt State Causes of Action.	5
	2. Plaintiffs' Claims Emanating from Defendants' False Advertisements Are Not Preempted.	5
III.	CONCLUSION	13

TABLE OF AUTHORITIES

Page(s)

CASES

AT&T v. Central Office Telephone
118 S.Ct 1956 (1998) 2, 9, 10

Bauchelle v. AT&T Corp.
989 F. Supp. 636 (D. N.J. 1997) 6

Bennett v. Alltel Mobile Communications
1996 WL 1054301 (M.D. Ala. 1996) 7, 13

Bennett v. Suncloud
56 Cal. App. 4th 91 (1997) 10

Bruss Co. v. Allnet Comm. Services,
606 F. Supp. 401 (N.D. Ill. 1985) 7

Corporate Housing Systems v. Cable & Wireless
12 F. Supp. 2d 688 (N.D. Ohio 1988) 5

Day v. AT&T Corp.
63 Cal. App. 4th 332 (1998) 2, 9-11

DeCastro v. AWACS
935 F. Supp. 541 (D. N.J. 1996) 2, 6, 7, 9, 11-13

Esquivel v. Southwestern Bell Mobile Sys.
920 F.Supp. 713 (S.D. Tex. 1996) 9

Hardy v. Claircom Comms. Group
86 Wash. App. 488, 937 P.2d 1128 (Wash. App. Ct. 1997) 9

Heichman v. AT&T
943 F. Supp. 1212 (C.D. Cal. 1995) 5

In re Comcast Cellular Telecommunications Litigation
949 F. Supp. 1193 (E. D. 1996) 2, 9, 11-13

In re Long Distance Telecomms. Litig.
831 F.2d 627 (6th Cir. 1987) 7

Kellerman v. MCI Telecomms. Corp.
493 N.E. 2d 1045, cert. denied, 479 U.S. 949 (1986) 7, 9

KVHP TV Partners v. Channel 12 of Beaumont
874 F. Supp. 756 (E.D. Tex. 1995) 6

MCI Telecomms. Corp. v. Graphnet
881 F.Supp. 126 (D. N.J. 1995) 2

Nader v. Allegheny Airlines
426 U.S. 290 (1976) 8, 9, 13

PH II v. Superior Court (Ibershof)
33 Cal. App. 4th 1680 (1995) 4

Sanderson v. AWACS
958 F. Supp. 947 (D. Del. 1997) 2, 11-13

Tenore v. A T &T Wireless Services,
136 Wash. 2d 322, 962 P.2d 104 (1998) 1, 2, 8-10, 12, 13

Weinberg v. Sprint Corporation
165 F.R.D. 431 (D. N.J. 1996) 2, 6, 10

FEDERAL STATUTES

Federal Communications Act
47 U.S.C. § 201(b) 5

Federal Communications Act
47 U.S.C. § 203(a) 10

Federal Communications Act
47 U.S.C. § 203(c) 10

Federal Communications Act
47 U.S.C. § 332(c)(3)(A) 1-7, 12, 13

Federal Communications Act
47 U.S.C. § 414 ..... 1, 6

STATE STATUTES

Code of Civil Procedure
§ 1008 10

TREATISES

Civil Proc. Before Trial, Cal. Pract. Guide
§ 7:140 (1988) 10

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In its motion to strike, defendant Los Angeles Cellular Telephone Company ("LA Cellular") advances again the very same argument it made in its demurrer only months ago, namely, that plaintiffs' claims are preempted by the Federal Communications Act, 47 U.S.C. § 332(c)(3)(A), and that the Court lacks jurisdiction to grant plaintiffs relief on those claims. Last November, LA Cellular argued, "[t]he remedies plaintiff seeks are contrary to the express preemption provision of the Federal Communications Act...", and that ".... plaintiff's prayer for restitution and compensatory damages is nothing less than a plea for this Court to determine what rate plaintiff 'should have' paid for the services rendered." Memorandum of Points and Authorities in Support of Demurrer of Defendant Los Angeles Cellular Telephone Company to Plaintiff's First Amended Class Action Complaint ("Demurrer Memorandum") at 11-12, Declaration of Stephen H. Cassidy ("Cassidy Decl."), Exh. 1. LA Cellular argues again, now, that if the Court were to issue an order granting plaintiffs' request for monetary relief, the Court would be engaged in rate-setting, an activity which falls within the exclusive province of the federal government under the Federal Communications Act (the "FCA"). As the Court implicitly recognized in its Order of November 12,1998 granting plaintiffs leave to amend their complaint, the claims plaintiffs assert here, and the concomitant relief they seek, are *expressly reserved for state adjudication* and are *not preempted* by the FCA.[1/]

The Court's conclusions were well-founded. The FCA includes a savings clause from which the overwhelming majority of courts conclude that state law claims emanating from false advertising, like those asserted here, are not preempted. See 47 U.S.C. § 414. In addition, the language of § 332(c)(3)(A), itself, carves out from preemption state law claims for false advertising and other claims judicially or legislatively-created for the benefit of consumers. See Tenore v. A T &T Wireless Services, 136 Wash. 2d 322, 962 P.2d 104 (1998) (given the savings clause, 47 U.S.C. § 414, and the other terms and conditions language in

[1/] As the Court will recall, the Court did not conclude on LA Cellular's demurrer that the claims plaintiff asserted were preempted, but that "The [First Amended] complaint contains allegations that are *surplusage* and matters that raise issues of federal preemption. Plaintiffs are encouraged to *narrow the causes of action and simplify the allegations*." Order, Nov. 12, 1998 (emphasis added), Cassidy Decl., Exh. 3.

47 U.S.C. § 332(c)(3)(A), state court claims for violation of Washington's consumer fraud statute, breach of contract, negligent misrepresentation, and common law fraud are not preempted.) The authorities upon which LA Cellular relies are inapposite. Each of those cases,[2/] save one, was decided under the filed-rate doctrine, a doctrine that has no application here. See Tenore, 962 P.2d at 109. The only other authority is factually distinguishable, inasmuch as the defendant's billing practices were directly at issue and its holding and reasoning was rejected in two companion cases. In re Comcast Cellular Telecommunications Litigation, 949 F. Supp. 1193 (E. D. 1996).[3/]

LA Cellular's motion to strike is procedurally improper as well as substantively infirm. LA Cellular's motion to strike violates Los Angeles Superior Court Rule 9.18(b), which in pertinent part provides, "[w]henever there are grounds for both a demurrer and a motion to strike, both must be served and filed at the same time and calendared for the same date. Similarly, Superior Court Rule 9.18(d) provides that "[a]ll grounds that the demurring party intends to assert shall be set forth in the demurrer to the original complaint, and grounds existing from the outset shall not be asserted piecemeal as the complaint is amended." Here, in violation of these rules, and in what appears to be an effort to circumvent them, LA Cellular raises the very same argument raised in its demurrer in a subsequent motion to strike. This attempted second bite at plaintiffs' Complaint on the same theory as advanced before should not be countenanced.

Moreover, LA Cellular's attempt to reargue the theory that this Court already rejected is premised on the unsupported notion that parties may *separately* challenge on federal preemption grounds the *claims* plaintiffs assert and the *relief* plaintiffs have requested. But the relief plaintiffs have requested flows from the claims they have asserted — courts analyzing federal preemption issues focus on the entirety of the *claims* plaintiffs allege, which necessarily include the relief that would flow from those claims. See, e.g., Weinberg v. Sprint

---

[2/] AT&T v. Central Office Telephone, 118 S.Ct 1956 (1998); MCI Telecomms. Corp. v. Graphnet, 881 F.Supp. 126 (D. N.J. 1995); Day v. AT&T, 63 Cal. App. 4th 332 (1998).

[3/] See DeCastro v. AWACS, 935 F. Supp. 541 (D. N.J. 1996); Sanderson v. AWACS, 958 F. Supp. 947 (D. Del. 1997).

Corporation, 165 F.R.D. 431 (D. N.J. 1996) (analyzing plaintiffs' "claims"). This Court engaged in the same proper analysis not two months ago when it determined that plaintiff's claims, in their entirety, were not preempted by the FCA, and suggested that plaintiff eliminate in the Second Amended Complaint the language that was not necessary to plead their state law claims and was correctly determined by the Court to be "surplusage." See Order, Nov. 12, 1998, Cassidy Decl., Exh. 3.

In short, defendant's motion to strike should be denied. There is simply no support for its thinly-disguised attempt to reopen the issue which the Court already once correctly decided–that plaintiffs' claims, arising from LA Cellular's false representations in its advertising that its coverage is seamless and can be accessed anywhere within its service area, are not preempted by the FCA.

II. ARGUMENT

A. The Motion to Strike Violates Los Angeles Superior Court Rule Requiring a Party To Simultaneously File a Demurrer and Motion to Strike.

On August 4, 1998, LA Cellular filed a demurrer to the first amended complaint on two grounds:

1. Plaintiff's claims were preempted because FCC regulations define L.A. Cellular's coverage area and require LA Cellular to disclose this information to prospective customers; and

2. The remedies sought directly conflict with the Federal Communications Act.

Demurrer Memorandum, Cassidy Decl., Exh. 1. Under the second argument, LA Cellular asserted that "plaintiff's prayer for restitution and compensatory damages is nothing less than a plea for this Court to determine what rate plaintiff 'should have' paid for the services rendered." Id. at 12. LA Cellular relied upon 47 U.S.C. § 332(c)(3)(A), which bars state or local governments from regulating the entry of or rates charged by cellular telephone providers. LA Cellular did not file a motion to strike plaintiff's claims for relief with its demurrer.

The Court sustained the demurrer with leave to amend, finding that the complaint contained "allegations that are surplusage and matters that raise issues of federal

preemption." Order, Nov. 12, 1998; Cassidy Decl., Exh. 3. The Court, however, disagreed with LA Cellular's contention that plaintiff's claims were preempted under federal law. Instead, the Court "encouraged [plaintiff] to narrow the causes of action and simplify the allegations." Id.

Plaintiffs took the Court's admonition to heart, and eliminated allegations referring to the FCC regulations that were the focus of LA Cellular's first argument for preemption in the demurrer. Instead of answering the Complaint, however, LA Cellular responded by moving to strike plaintiffs' requests for compensatory damages and restitution, *on the same grounds for preemption raised in the demurrer.*

Appellate courts have cautioned that "use of the motion to strike should be cautious and sparing." PH II v. Superior Court (Ibershof), 33 Cal. App. 4th 1680, 1683 (1995). Superior Court Rule 9.18(b) reflects this policy. Los Angeles County Superior Court Rule 9.18(b) requires that "[w]henever there are grounds for both a demurrer and a motion to strike, both must be served and filed at the same time and calendared for the same date." The basis for both the motion to strike and the demurrer is LA Cellular's argument that plaintiffs' claims are preempted under 47 U.S.C. § 332(c)(3)(A). By failing to file simultaneously its motion to strike with its demurrer, LA Cellular has forfeited its right to move to strike portions of the Second Amended Complaint under Rule 9.18(b).

Similarly, Rule 9.18(d), discouraging successive demurrers, requires that all grounds that exist as of the date the demurrer is filed must be asserted in the demurrer. One cannot reassert the same arguments in a subsequent demurrer that were overruled in a prior ruling. Together, Rule 9.18(b) and (d) soundly prohibit a party from engaging in the tactics that strain judicial resources and impose unnecessary costs on opposing parties employed here by LA Cellular.

B. Plaintiffs' Claims Are Not Preempted By The Federal Communications Act.

1. The Federal Communications Act Does Not Wholly Preempt State Causes of Action.

Examining both the Congressional intent and structure and design of the Federal Communications Act ("the FCA"), a series of federal courts have held the FCA does not wholly preempt state law causes of action. In Heichman v. AT&T, 943 F. Supp. 1212, 1220 (C.D. Cal. 1995), the court noted that the complete preemption argument had been rejected by every court that considered the issue since two Supreme Court's decision on preemption in the late 1980's. This trend has continued to the present as shown by the recent decisions summarized in Corporate Housing Systems v. Cable & Wireless, 12 F. Supp. 2d 688, 691-92 (N.D. Ohio 1988).

2. Plaintiffs' Claims Emanating from Defendants' False Advertisements Are Not Preempted.

In the motion to strike, LA Cellular has wisely abandoned the argument it made in its demurrer that resolving plaintiffs' claims in state court would "frustrate Congress' manifest intent to remove **all** state regulation of matters entrusted exclusively to the FCC." Reply Brief in Support of Demurrer at 9 (emphasis in original); Cassidy Decl., Exh. 2. LA Cellular concedes plaintiffs may assert their claims, and this Court may enjoin any false advertisements. LA Cellular continues, however, to seek to preclude plaintiffs from recovery of compensatory damages, restitution and disgorgement of profits. LA Cellular argues, again, that such relief would necessitate the Court to engage in rate-making barred under 47 U.S.C. § 332(c)(3)(A). LA Cellular's assertion of "remedy" preemption is just as erroneous as its "claim" preemption argument was in its original demurrer.

As explained in plaintiff's opposition to the demurrer, no provision in the FCA provides the FCC or federal courts with jurisdiction over false and deceptive practices by telecommunication providers. The FCA requires only that "[a]ll charges, practices, classifications, and regulations" be just. 47 U.S.C. § 201(b). Moreover, the FCA does not impose a "duty . . . to make accurate and authentic representations in their promotional

practices." DeCastro v. AWACS, 935 F. Supp. 541, 550 (D. N.J. 1996). There is no remedy under the FCA for private parties to recover for deceptive and misleading advertising and promotional practices. Bauchelle v. AT&T Corp., 989 F. Supp. 636, 645 (D. N.J. 1997); Weinberg v. Sprint Corp., 165 F.R.D. 431, 438 (1996) ("Accordingly, the Court finds that the Act's civil enforcement provision does not provide a remedy through which a customer may recover for a common carrier's failure to disclose a billing practice.").

Courts determining that the FCA does not preempt state claims relating to false and deceptive advertising have relied, in part, upon the FCA's "savings clause." Title 47 § 414 provides: "[N]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." See DeCastro, 935 F. Supp. at 5501 ("Many courts have relied upon this savings clause to find that Congress intended to preserve state law claims for breach of duties which are distinguishable from duties created by the Act."), citing KVHP TV Partners v. Channel 12 of Beaumont, 874 F. Supp. 756, 761 (E.D. Tex. 1995) ("The inclusion of this savings clause is plainly inconsistent with the congressional displacement of state contract and fraud claims.").

In addition, courts have concluded that consumer fraud and false advertising claims are not preempted for another reason: the express language of 47 U.S.C. § 332(c)(3)(A), itself, as amended, has no preemptive effect on these claims. Falling within a section of the Act relating to the FCC's management of the radio spectrum, the statute provides:

> [N]o State or local government shall have any authority to *regulate the entry of or the rates charged* by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3)(A) (emphasis added). On its face, the provision solely bars state action that regulates entry in the market or rates charged. State regulation of a cellular telephone provider's marketing and advertising practices are not proscribed.

The legislative record leaves no doubt that Congress did not intend for § 332(c)(3)(A) to preempt state consumer protection statutes and remedies for any violations:

> It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters. . . .This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under 'terms and conditions.'

DeCastro, 935 F. Supp. at 552, quoting H.R. Rep. No. 103-11, 103rd Cong., 1st Sess. 211, 261, reprinted in 1993 U.S.C.A.A.N. 378, 588.

Prior to the 1993 amendment of § 332, it was recognized that judicial review of claims for the failure to disclose deceptive practices would not enmesh a court in rate-making proscribed under the FCA. In re Long Distance Telecomms. Litig., 831 F.2d 627, 633 (6th Cir. 1987)(state law claims for fraud and deceit arising from carrier's failure to disclose charges for uncompleted calls "do not require agency expertise for their treatment and are within the conventional experience of judges") (internal quotations omitted); Bruss Co. v. Allnet Comm. Services, 606 F. Supp. 401, 411 (N.D. Ill. 1985) (causes of action under state deceptive business practices act did not conflict with provisions of the Act or interfere with Congress' regulatory authority).; Kellerman v. MCI Telecomms. Corp., 493 N.E. 2d 1045, 1051, cert. denied, 479 U.S. 949 (1986) (Illinois Supreme Court held state false advertising claims do not concern reasonableness of rates).

Moreover, cases specifically involving cellular telephone providers decided after § 332 was amended have held that state claims seeking redress for a defendant's false advertising practices, and an award of damages for past abuses, are not preempted. In Bennett v. Alltel Mobile Communications, 1996 WL 1054301 (M.D. Ala. 1996), for example, plaintiff alleged that cellular telephone provider Alltel misrepresented and failed to disclose its practice of rounding up charges for airtime used to the next full minute. The court found "a commonsense reading of the complaint in this case suggests that the state law claims related to the failure to disclose rather than rates or service." (Id. at *5.) The court specifically rejected Alltel's claim of preemption under § 332(c)(3)(A):

> Clearly, Congress could have completely preempted state law by stating that § 332(c)(3)(A) would preempt any state law that related to the rates charged by commercial mobile service

> providers, if it so desired. However, Congress chose to only prohibit the regulation of those rates by the states. In fact, § 332(c)(3)(A) does not seek to vindicate the same interests upon which plaintiff's state cause of action seeks relief. [Citation omitted.] Here, the plaintiff is not contesting the rate charged, but rather is challenging Alltel's failure to disclose in its contract with consumers its practice of "rounding up" charges for airtime. Hence, this action will not affect the rates charged; instead, it may, depending on the outcome, affect the disclosure of the rates charged.

Id. at *4.

The court also rejected Alltel's argument that the *relief sought* by plaintiff was preempted by federal law:

> The court finds that the relief sought in the form of a refund in the difference between the amounts charged and amount consumers allegedly thought they were being charged does not confer the court with federal-question jurisdiction in that it does not relate to the rate charged or services provided, particularly when a commonsense reading of the complaint reflects the pleading of state law claims.

Id. at *3.

In a lengthy decision last September, the Washington Supreme Court engaged in a comprehensive review of the Act, its legislative history, relevant FCC reports, and all leading authorities, and unanimously rejected the same preemption argument raised by LA Cellular in this action. Tenore v. AT&T Wireless Services, 136 Wash.2d 322, 962 P.2d 104 (1998). In that action, plaintiffs alleged that the cellular telephone provider failed to disclose in its advertising that it rounded airtime charges up to the nearest minute.

With respect to AT&T Wireless' contention that claims of false advertising were within the special expertise of the FCC and thereby preempted, the Tenore court held:

> [T]here is no conflict between the authority of the FCC and that of a court in deciding whether AT&T's advertising practices are misleading. As in Nader [v. Allegheny Airlines, 426 U.S. 290 (1976)], Appellants in this case do not challenge the reasonableness of AT&T's underlying practice of rounding its call charges. Also, although the FCC enacted the preemption provision in Section 332 to promote uniformity, it did so primarily to prevent burdensome and unnecessary state regulatory practices, and not to subject the CMRS [commercial mobile radio service] infrastructure to rigid control. Nor does the FCC have exclusive authority over advertising and billing practices, if at all.

962 P.2d at 116.

Like LA Cellular, here, AT&T Wireless also asserted that plaintiffs request for damages in effect required the court to engage rate regulation. Tenore found persuasive DeCastro, 935 F. Supp. at 552, and Kellerman, 493 N.E. 2d 1045, which both held that state law claims relating to inadequate disclosures concerning a defendant's billing practices do not challenge the lawfulness or reasonableness of the rates themselves: "Kellerman and DeCastro both conclude that the FCA does not displace, but instead supplements, state law claims against service providers for misrepresentation, fraud and unfair billing practices." 962 P.2d at 113.

Tenore also found Nader v. Allegheny Airlines, 426 U.S. 290 (1976), applicable authority. In Nader, the plaintiff was "bumped" from his reserved seat because an airline had overbooked its flights as part of a practice of deliberate overbooking. The plaintiff contested the nondisclosure of the overbooking, not the practice itself. The airline claimed that any action for damages for misrepresentation would, in effect, be an attack on the reasonableness of federally regulated rates. Nadar held that the action "does not turn on a determination of the reasonableness of a challenged practice." 426 U.S. at 305. Further, any "impact on rates that may result from the imposition of tort liability . . . would be merely incidental." Id. at 300.

In its motion to strike, LA Cellular relies upon AT&T v. Central Office Telephone, 118 S. Ct. 1956 (1998); Day v. AT&T, 63 Cal. App. 4th 332 (1998), and In re Comcast Cellular Telecom. Litigation, 949 F. Supp. 1193 (E.D. Pa. 1996).[4/] All of these decisions were published before LA Cellular filed its demurrer. LA Cellular cited Central Office and Day in its reply memorandum in support of the demurrer, but now offers for the first time as support for its position In re Comcast. None of these cases should be considered

---

[4/]LA Cellular also cites Esquivel v. Southwestern Bell Mobile Sys., 920 F.Supp. 713 (S.D. Tex. 1996) and Hardy v. Claircom Comms. Group, 86 Wash. App. 488, 937 P.2d 1128 (Wash. App. Ct. 1997). Esquivel, in fact, it supports plaintiffs' argument that state law claims against cellular telephone providers are not preempted by the Federal Communications Act. Id. at 714. In Tenore, the Washington State Supreme Court overruled Hardy to the extent it applied the filed-rate doctrine to cellular telephone providers. 962 P.2d at 117.

by the Court. Code of Civil Procedure § 1008 precludes a party from resubmitting the same or earlier published authorities in support of a renewed claim previously rejected by the court. See Bennett v. Suncloud, 56 Cal. App. 4th 91, 96 n.1 (1997); Civil Proc. Before Trial, Cal. Pract. Guide, § 7:140 (1988).

Nor do these cases necessitate that the Court reconsider its earlier order. Each of the other authorities cited by LA Cellular was decided under the filed-rate doctrine. Here, LA Cellular is one of the " . . . cellular telephone service provides, broadly characterized as commercial mobile radio service providers, [that] are specifically exempted from tariff filing requirements by the FCC. Because there is no tariff filing requirement, the reasonableness of rates charged by commercial mobile radio services ("CMRS") providers is not determined by the FCC." Tenore, 962 P.2d at 109.

Here, the expansive reach of the filed rate doctrine is wholly inapplicable. Only common carriers are required to file tariffs under the FCA.[5/] Neither LA Cellular, nor any other cellular telephone company, is required to file tariffs. The same situation as existed in Tenore is present in this case: "[N]ot only are there no tariffs on file, but the two purposes behind the 'filed rate' doctrine — preserving an agency's primary jurisdiction to determine the reasonableness of rates and insuring that only those rates approved are charged — do not apply in this case." Id.

Hence, Day v. AT&T Corp., supra, (at 5-6 of LA Cellular's memo), is also irrelevant. In Day, plaintiffs alleged that common carriers that sold prepaid phone cards in several minute blocks engaged in misleading and deceptive advertising because the advertising and packaging materials for the cards did not reveal that all calls were rounded up to the next

---

[5/]Under the FCA, common carriers must file tariffs showing all charges and related practices with the FCC. 47 U.S.C. § 203(a). A carrier may not charge customers except as specified in their tariffs. 47 U.S.C. § 203(c). "The 'filed rate doctrine' insulates from judicial challenge the rate filed by common carriers with the FCC and prohibits courts from awarding relief that would impose upon a carrier any rate other than that filed with the FCC." Weinberg, 165 F.R.D. at 438, n.5. "Courts have construed the 'filed rate' doctrine broadly in dismissing lawsuits against telecommunications carriers involving direct or indirect challenges to the reasonableness of rates." Tenore, 962 P.2d at 108. "Regardless of the carrier's motive — whether it seeks to benefit or harm a particular customer — the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services." Central Office, 118 S. Ct. at 1963.

full minute. The case concerned the relationship between the filed rate doctrine and California's statutes proscribing unfair and deceptive business practices. 74 Cal.App.4th at 336. Importantly, Day permitted plaintiffs' case to proceed, but held that any request for monetary relief impinged upon *tariffs* and, thus, were barred under the filed rate doctrine. Id. at 339.

Finally, In re Comcast, 949 F. Supp. 1193, the one "new" decision in LA Cellular's motion to strike, is factually distinguishable from the present action, and its holding and reasoning has been rejected in two companion cases. AWACS, Inc., doing business as Comcast Metrophone ("Comcast"), was a cellular telephone provider in several Eastern states that charged subscribers for the time from when a call was initiated to the time when the call was answered by the recipient. Comcast's practices resulted in the dubious distinction of being sued in Pennsylvania, In re Comcast; New Jersey, Decastro; and Delaware, Sanderson v. AWACS, 958 F. Supp. 947 (D. Del. 1997).

All three cases concerned the propriety of Comcast's removal of the suits to federal court. Plaintiffs in each case filed nearly identical complaints alleging violations of state unfair business practices, breach of contract, breach of the implied duty of good faith and fair dealing, and unjust enrichment by billing for the non-communication time. Sanderson, 958 F. Supp. at 951. In each case, Comcast argued that the gravamen of the action was its billing practices, not its advertising concerning its billing practices. In re Comcast, 949 F. Supp. at 1199.

In In re Comcast, the court agreed with Comcast's argument with respect to the last two causes of action, finding these counts "present a direct challenge to the reasonableness of Defendant's billing practices." Id. at 1200. The court concluded that the breach of implied duty of good faith and fair dealing and unjust enrichment claims actually arose under federal common law as they were "indistinguishable from causes of action created by the terms of the Communications Act," and upheld the removal of the complaint. Id. at 1205.

However, in DeCastro, the court reached the opposite conclusion, remanding the case to state court. Commenting on the same third and fourth causes of action that were

the focus of the In re Comcast court's decision, DeCastro found that "while it may be true that Congress intended claims against telecommunications providers directly challenging the provider's rates or entry into the market to be completely pre-empted, the claims in Counts III and IV [breach of the implied duty of good faith and fair dealing and unjust enrichment] in this case challenge a billing practice, not a rate or market entry." 935 F. Supp. at 553. DeCastro found "persuasive those cases holding that the Communications Act does not displace, but rather supplements, state law claims against cellular telephone service providers for consumer fraud, misrepresentation, breach of contract, and unfair billing practices." Id.

The final case in this trilogy is Sanderson which the Court had the benefit of the competing decisions in DeCastro and In re Comcast. Sanderson directly rejected the reasoning of In re Comcast: "[T]his Court respectfully disagrees with the court in the Pennsylvania companion case, and holds that Sanderson's claims cannot be recharacterized as arising under federal common law." 958 F. Supp. at 960. Sanderson concluded that the breach of implied duty of good faith and fair dealing and unjust enrichment claims did not challenge the reasonableness of Comcast's billing practices and, thus, were not preempted by § 332(c)(3)(A). Id. at 956-57.

Ultimately, here, there is no need for the Court to determine whether In re Comcast or DeCastro and Sanderson are better reasoned decisions. In contrast to the Comcast cases, and even Tenore, the present action *does not concern the failure to disclose a billing practice.* The gravamen of the Second Amended Complaint is alleged *affirmative misrepresentations and failure to disclose material facts concerning its coverage.* The Complaint alleges that LA Cellular's representations about its "seamless" calling area in excess of 30,000 square miles in Southern California are inaccurate, misleading and intentionally deceptive. (SAC, ¶ 3.) The evidence presented at trial will concern whether gaps or "dead zones" exist within LA Cellular's calling area. This is a classic case of false advertising.

To the extent that rates could in some manner be affected by an award of monetary damages, § 332(c)(3)(A) is inapplicable. The statute does not bar "regulation relating to" or "indirectly impacting" rates. Instead, it strips states of "any authority to regulate . . .

the rates charged." As explained in Bennett, 1996 WL 105431, which also involved the non-disclosure of a billing practice by a cellular telephone provider, the savings clause of the FCA fatally undermines any expansive interpretation of § 332(c)(3)(A): "[T]he savings clause "indicates a lack of intent by Congress to extend the Communications Act, as amended, to all matters somehow related to those known to be preempted." 1996 WL 1054301, at *5. The Washington Supreme Court's decision on point in Tenore is persuasive:

> There is sufficient reliable authority for this Court to conclude that the state law claims brought by Appellants and the damages they seek do not implicate rate regulation prohibited by Section 332 of the FCA. The award of damages is not per se rate regulation, and as the United States Supreme Court has observed, does not require a court to "substitute its judgment for the agency's on the reasonableness of a rate." (Nader, 426 U.S. at 299.) Any court is competent to determine an award of damages.

Tenore, 962 P.2d at 115.

III. CONCLUSION

LA Cellular's motion to strike should be summarily rejected as procedurally defective. Substantively, the motion should be denied. There is no support for the proposition that state claims of false advertising against cellular telephone providers are preempted and/or limited to non-monetary relief. A careful reading of the sole case submitted by LA Cellular in support of this assertion, the maligned In re Comcast, shows that the court reached its holding only after recharacterizing the two claims indirectly related to Comcast's advertising practices as federal common law claims under the FCA. In re Comcast, 949 F. Supp. at 1200. Here, the false advertising claims are wholly different than the claims asserted in In re Comcast. In every other decision in which a plaintiff has alleged false and deceptive advertising against a cellular telephone provider, Tenore, Sanderson, DeCastro and Bennett, the court did not limit the remedies permissible under state law.

DATED: February 1, 1999

LIEFF, CABRASER, HEIMANN
& BERNSTEIN, LLP
Elizabeth J. Cabraser
Jacqueline E. Mottek
Stephen H. Cassidy
Fabrice N. Vincent

By: Jacqueline Mottek by SHC
Jacqueline E. Mottek

Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000

William S. Lerach
Alan M. Mansfield
Patrick W. Daniels
MILBERG WEISS BERSHAD
HYNES & LERACH LLP
600 West Broadway, Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

Reed R. Kathrein
MILBERG WEISS BERSHAD
HYNES & LERACH LLP
222 Kearny Street, 10th Floor
San Francisco, CA 94108
Telephone: 415/288-4545

RONALD F. HOFFMAN
ATTORNEY AT LAW
13070 Survey Point
San Diego, CA 92130
Telephone: 619/259-4743

Attorneys for Plaintiffs

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/11/99			DEPT. 56
HONORABLE WENDELL MORTIMER, JR.	JUDGE	G. CAMPBELL M. MEDARIS	DEPUTY CLERK Asst. Clerk
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
none	Deputy Sheriff	L. STALEY	Reporter

9:00 am	BC186787	Plaintiff Counsel	LIEFF CABRASER HEIMANN BY: JACQUELINE MOTTER(X)
	MARCIA SPIELHOLZ VS L A CELLULAR TELEPHONE COMPANY AL R, ~ SC039628	Defendant Counsel	GIBSON DUNN CRUTCHER BY: STEVEN SLETTEN (X)

NATURE OF PROCEEDINGS:

RECEIVED
FEB 16 1999
LIEFF, CABRASER, HEIMANN & BERNSTEIN

MOTION OF DEFENDANTS TO STRIKE IMPROPER CLAIMS FOR RELIEF IN SECOND AMENDED COMPLAINT;
C/F 2/4/99

Motion is argued and taken under submission. LATER: Court rules upon submitted matter as follows:

Motion granted. Plaintiff's allegations as to monetary damages violate the preemptive mandate of Section 332 of the Federal Communications Act. The second amended complaint recovery allegations would require the state court to regulate or adjust rates which is prohibited by Section 332.

Copies of this minute order mailed to counsel this date via U.S. Mail.

JACQUELINE E. MOTTER, ESQ.
LIEFF CABRASER HEIMANN BERNSTEIN
275 BATTERY ST. 30TH FLR.
SAN FRANCISCO, CA 94111-3339

STEVEN SLETTEN, ESQ.
GIBSON DUNN CRUTCHER
333 SO. GRAND AVENUE
LOS ANGELES, CA 90071-3197

MINUTES ENTERED
02/11/99
COUNTY CLERK

Exhibit 4